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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-767

UNITED STATES OF AMERICA, *Appellant*

v.

THE CONNECTICUT NATIONAL BANK, THE FIRST NEW HAVEN NATIONAL BANK, AND JAMES E. SMITH, Comptroller of the Currency, *Appellees.*

On Appeal from the United States District Court for the District of Connecticut

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MOTION TO AFFIRM

Appellee James E. Smith, Comptroller of the Currency, moves this Court under Rule 16 to affirm the judgment of the district court, reported at 362 F. Supp. 240, on the ground that this case does not warrant plenary consideration because no basis exists for disturbing the district court's findings of fact and its conclusions therefrom.

A. STATUTES INVOLVED

Subsection 5(B) of the Bank Merger Act of 1966, 80 Stat. 8, as amended, 12 U.S.C. 1828(c)(5)(B), provides in pertinent part:

> The [Comptroller of the Currency] shall not approve—
>
> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

12 U.S.C. 36 provides in pertinent part:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) . . . and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and *subject to the restrictions as to location imposed by the law of the State on State banks* (Emphasis added).

C.G.S.A. 36-59 provides in pertinent part:

> (1) With the approval of the commissioner, any state bank and trust company having a combined capital and surplus of not less than one million dollars may:
>
> (a) Establish and operate one or more branches within the town in which such state bank and trust company is located;
>
> (b) Establish and operate one or more branches in any town or towns within this state in which the main office of no state and trust company or national banking association is located, provided the capital stock and surplus of such state bank and trust company is in excess of one million dollars.

B. STATEMENT

On November 19, 1970, an agreement was entered into between the respective boards of directors of The Connecticut National Bank, Bridgeport, Connecticut (hereinafter Connecticut National) and The First New Haven National Bank, New Haven, Connecticut (hereinafter First New Haven) to consolidate under

the charter of the latter and with the title of "The First Connecticut National Bank." Application was then made by the two banks on February 2, 1971, to the Comptroller of the Currency for permission to consolidate. Pursuant to provisions of the Bank Merger Act of 1966, 12 U.S.C. 1828(c)(4), the Comptroller sought and received from the Department of Justice, the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation reports on the competitive factors involved in the application. After giving due consideration to these reports and to other factors bearing upon ". . . the probable effect of the transaction in meeting the convenience and needs of the community to be served,"[1] the Comptroller approved the proposed consolidation on July 26, 1971.[2]

In his opinion (IX-1), the Comptroller pointed out that Connecticut's economic development is largely dependent on financing by out-of-state banks, particularly New York and Boston banks. To generate increased competition with these institutions, additional large banks are needed in Connecticut. The creation of a sizable bank in the southwestern part of the state would better enable local interests to challenge the

[1] 12 U.S.C. 1828(c)(5)(B)

[2] It should be noted that the Comptroller of the Currency was the only regulatory agency which evaluated and balanced *both* the competitive factors and the needs and convenience factors in the case at bar. The opinions rendered by the three other agencies are based solely on an analysis of competitive factors, as required by 12 U.S.C. 1828(c)(4), and do not include an assessment of the needs and convenience aspects. Indeed, both the Federal Reserve Board and the FDIC competitive reports (GX-97 and GX-96) contain express disclaimers of any intent to go beyond the competitive factors. While the report of the Department of Justice (GX-95) makes no such disclaimer, the Department's views clearly do not include an analysis of needs and convenience criteria.

outsiders and retain banking profits now being siphoned from the state.

The Comptroller was also of the opinion that existing competition between the two banks is confined to a small area and could not be termed "substantial", as that concept is employed in either Section 7 of the Clayton Act or in 12 U.S.C. 1828(c)(5)(B). Potential competition in the reasonably foreseeable future between the two defendants was, in the Comptroller's view, dimmed by the restrictive nature of Connecticut's home-office-protection banking statute[3] and by the economic infeasibility of establishing a significant number of *de novo* branches in each other's trade areas, or elsewhere. (IX-1 at 5)

On August 23, 1971, the Department of Justice filed its complaint in this action, alleging that the proposed consolidation would violate Section 7 of the Clayton Act by eliminating substantial existing and potential competition. The filing of the complaint automatically stayed the consolidation pursuant to 12 U.S.C. 1828(c)(7)(A). The motion of the Comptroller of the Currency to intervene as a party to this action under the provisions of 12 U.S.C. 1828(c)(7)(D) was granted on October 19, 1971.

After extensive discovery procedures lasting nearly a year, trial commenced on October 10, 1972. Testimony was heard from twenty-four witnesses, four of whom were called by plaintiff and the remainder by defendants and intervenor. Sixteen trial days were consumed spanning a period of five weeks.

Subsequent to this Court's decisions in *United States* v. *First National Bancorporation,* 410 U.S. 577

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[3] C.G.S.A. 36-59.

(1973) *aff'g.* 329 F. Supp. 1003 (D. Colo. 1971), and *United States* v. *Falstaff Brewing Corp.,* 410 U.S. 526 (1973), the district court issued its opinion, holding that appellant had failed to sustain its burden of proving that the consolidation would tend substantially to lessen competition, actual or potential, in any line of commerce in any section of the country. The lower court was also of the view that if the anticompetitive effects alleged by the appellant were assumed for the sake of argument, such effects are clearly outweighed by the probable effect of the transaction in meeting the convenience and needs of the community to be served. 362 F. Supp. at 288, J.S. 103a. The court's opinion was accompanied by 293 findings of fact. 362 F. Supp. at 242-278; J.S. 2a-80a.

C. ARGUMENT

(1) The District Court's Opinion Is Based Upon Findings of Fact For Which Substantial Evidence Can Be Found In The Record. For This Reason, The District Court's Findings Are Not Clearly Erroneous.

Under settled principles of law, the filing of a suit by the Government (herein the appellant) imposes upon the plaintiff the duty to come forward with the quantum of proof necessary to show a violation of the civil or criminal laws of the United States. In civil antitrust cases brought by the Government under Section 7 of the Clayton Act, 15 U.S.C. 18, the plaintiff is required to prove more than the mere possibility of a substantial lessening of competition as a result of the merger in question. Rather, the Government must show that the prohibited effect of the merger is "reasonably probable." *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 323 (1962); *United States* v. *E. I. DuPont de Nemours & Co.,* 353 U.S. 586, 607 (1957);

United States v. *International Telephone & Tel. Corp.*, 324 F. Supp. 19, 30-31 (D. Conn. 1970).

The central question of the merger's effect and the degree to which it lessens competition is a question of fact that is peculiarly within the province of the trial court. The trier of fact is called upon to assess not only whether a substantial lessening of competition is a reasonable probability, but also whether the adverse effects "are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." 12 U.S.C. 1828(c)(5)(B). The weighing of these factors is within the special discretion of the trial court alone, and is not to be disturbed by appellate courts unless "clearly erroneous." Fed. R. Civ. P. 52(a).

This Court has made abundantly clear that appellate courts "must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). In the context of an antitrust case, the Court has declared that findings of fact cannot be set aside as "clearly erroneous" merely because the Court might give the facts another construction, resolve the ambiguities differently, or find a more sinister cast to actions which the lower court deemed innocent. *United States* v. *Nat'l. Ass'n of Real Estate Bds.*, 339 U.S. 485, 495-96 (1950); *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242, 252 (1959); *United States* v. *Oregon State Medical Soc.*, 343 U.S. 326, 332 (1952). Even in antitrust cases in which the Government is the appellant, reviewing courts do not have the discretion to engage in the equivalent of a trial *de novo* of disputed facts. As this

Court stated in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949):

> It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of the evidence is not "clearly erroneous."

In spite of the unmistakable import of Rule 52(a) and this Court's utterances on the subject, appellant seeks here what is tantamount to a trial *de novo* in the nation's highest Court. There is no basis for this plea. The findings of fact, upon which the court's opinion is based, are well grounded in the evidence submitted at trial and are therefore not clearly erroneous. This can be seen from an examination of several questions surrounding the consolidation's effect upon potential competition, an issue which dominates this case.

Appellant insists that this consolidation will eliminate the prospect of First New Haven's and Connecticut National's entering each other's markets in Bridgeport and New Haven, respectively. (J.S. 24-25) To prove that entry is attractive and reasonably foreseeable, appellant introduced at trial certain evidence purporting to show that both metropolitan areas

are sufficiently prosperous and dynamic to attract new investment. Appellee banks, on the other hand, attempted to prove that the economies of Bridgeport and New Haven are sluggish and not conducive to entry by outsiders. This proof was accomplished by the introduction of objective evidence suggesting that population trends in Bridgeport had remained static from 1960-1970, while the population of Connecticut grew 19% in the same ten years; and that total retail sales in Bridgeport, total employment of Bridgeport residents in Bridgeport, and total manufacturing employment in Bridgeport had increased during the recent past at rates far below increases for Connecticut as a whole. (DX-28) Similar evidence on the economy of New Haven was presented to show that that city also lacked the necessary ingredients to attract a bank like Connecticut National.[4]

Thus, a classic conflict was created between two sets of evidence. As the trier of fact, the district court alone could resolve this conflict using the traditional means employed by a trial court, e.g., examination of the credentials of the expert witness who sponsored the evi-

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[4] Appellees also offered proof that both the City of Bridgeport and the City of New Haven are closed under Connecticut's home office protection law to *de novo* branching by banks not headquartered therein. Thus, regardless of the allure of the economies of the two cities, *de novo* branching into each is legally impossible. The district court noted these important facts. Findings 120 and 124, 362 F. Supp. at 256-257, J.S. 34a-35a. Appellees also showed that it was not "reasonably probable" that the two merging banks would enter the suburbs surrounding Bridgeport and New Haven because (a) many of the towns on the fringes of the two cities are closed by law to *de novo* branching and (b) the only effective entry into these two metropolitan areas would be by means of offices in the downtown cores of the two cities. See, for exemple, Findings 122 and 189, 362 F. Supp. at 257 and 265, J. S. 34a and 53a.

dence, observation of the witness' demeanor, assessing the effect of cross-examination upon direct testimony, etc. The district court duly performed this task, adopting some of the facts urged by appellees into the court's own findings of fact and rejecting others advanced by the appellant. (See Findings 121 and 124, 362 F. Supp. at 257 & n. 18, J.S. 34a-35a). That the district court ultimately had to make a choice between two permissible views of the weight of the evidence does not make its findings "clearly erroneous", *United States* v. *Yellow Cab Co., supra.*, 338 U.S. at 342, and, we submit, not subject to change by this Court.

The above represents only one example of the many conflicts of evidence that characterized this case. Throughout the trial, neither side hesitated to meet the other's proof with facts and testimony suggesting a contrary point of view. In this situation, the burden on the trial court was formidable. But the court resolved the conflicts, carefully constructing its own findings and thereby obviating any legitimate reason for plenary consideration thereof by this Court.[8]

Several additional instances of choices between conflicting evidence that had to be made by the district court will bear out this argument.

(a) Appellant argues that Connecticut National and First New Haven have the capability and incentive to expand by *de novo* branching, suggesting that this consolidation will eliminate the potential for competition between the two banks in different parts of the state where they are not now located. (J.S. 29-30).

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[8] In contrast, see *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964), where findings proposed by defendants' counsel were mechanically adopted verbatim by the district court.

To demonstrate that both banks are inclined to grow by means of branching, appellant cited at trial appellees' branching history and the increases in their total resources and net income over selected years. (J.S. 8-9). In response, appellees presented objective evidence that Connecticut National's branch expansion has dramatically slowed in recent years[6] following the bank's realization that *de novo* branching was becoming prohibitively expensive, with a consequent drain on bank earnings. Moreover, appellees pointed out that Connecticut National's ratio of loans to capital is considered "weak" under the guidelines of the Comptroller of the Currency, indicating that the bank would have difficulty raising either equity or debt capital for branch expansion. With respect to First New Haven, appellees demonstrated that in 1971, nine of the bank's 22 offices were still showing operating losses aggregating $535,000 per year. In addition, First New Haven's tendency to remain a local institution was emphasized by statistics indicating that of the nine new branches opened since 1963, five are located within the boundaries of the City of New Haven.

Faced with relevant data from both sides, the trial court had to decide which evidence was most probative of the banks' true capacity to expand through *de novo* branching. The court's findings (Findings 167-184, 362 F. Supp. at 262-265, J.S. 46a-51a) reflect its judgment that appellant's theory, while superficially plausible, cannot withstand analysis of the realities. Under these circumstances, it cannot seriously be contended that the court's findings are "clearly erroneous."

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[6] In fact, from 1965 to 1970, Connecticut National had the lowest rate of increase in number of branches among the nine largest commercial banks headquartered in Connecticut. (Tr. 939; D-16; Finding 167, 362 F.Supp. at 262, J.S. 46a).

(b) Appellant also argues that appellees should have sought an acquisition considerably smaller than the one now subject to litigation. Under this "toehold" acquisition theory, as explained by appellant, Connecticut National would have generated fewer anticompetitive effects had it merged with a less sizable bank in the New Haven SMSA, specifically, with a bank in a suburban town like North Haven, Hamden, North Branford or Woodbridge. (J.S. 27-28; Finding 186, 362 F. Supp. at 265, J.S. 52a) Similarly, First New Haven, in appellant's view, should have explored merger opportunities with the Lafayette Bank & Trust Co. of Bridgeport or with James Staples & Co., a private banker in Bridgeport.

No evidence whatsoever was advanced by appellant at trial to indicate that any of the suggested "toehold" alternatives was available for sale. The practical problem that may arise as a result of plaintiff's failure of proof is apparent in the frequent refusals to sell encountered by Connecticut National in the past when negotiating for mergers with small banks. (Tr. 784; Finding 191, 362 F. Supp. at 265, J.S. 53a). Thus, it is purely speculative for appellant to suggest that such an approach could be followed.

The problem of availability aside, there exist no toehold acquisitions in the entire New Haven SMSA which would provide effective entry into New Haven. The Second Bank of New Haven (until recently Second National Bank), the smallest bank in that city, is the tenth largest in the state and has been identified by plaintiff as having the capacity to go statewide; its size and the premium it would command as a condition of sale put it beyond the financial capability of Connecticut National. The Woodbridge Bank and Trust

Company is too far removed from New Haven's core to allow the acquiring bank to compete effectively for the business it would need to become profitable, and its future growth will be inhibited by geographic barriers surrounding its present location. (Finding 187, 362 F. Supp. at 265, J.S. 52a). Acquisition of banks in North Branford, North Haven and Hamden would also put Connecticut National in a position too distant from downtown New Haven to have any beneficial competitive impact. Serious questions are raised as well about the profitability of any one of these acquisitions in view of the high premium that likely would be exacted. Further, Connecticut National would find itself stiffled in any one of the suggested toeholds, unable to branch into New Haven or into the other closed towns bordering the City. (Tr. 690-692, 331-332; Findings 188-189, 362 F. Supp. at 265, J.S. 52a-53a).

Finally, the likelihood of Connecticut National's making an acquisition of any nature, absent the consolidation, is severely diminished by its experience in merging Atlantic National Bank in Stamford in 1970. The bank's stockholders are still suffering from a 10% dilution in their earnings-per-share arising from the premium of $1.2 million paid to Atlantic to consummate the merger. Stockholder support for further acquisitions by merger is in doubt. (Tr. 1565-1566; Finding 1, 326 F.Supp. at 242, J.S. 2a-3a).

With respect to acquisitions in Bridgeport available to First New Haven, there are only two, neither of which is a reasonable choice for an entrant wishing to compete effectively in that city. The objective evidence characterizing James Staples & Co., a private banker with only one office and barely $2.5 million in deposits, is sufficient by itself to show that no commer-

cial bank desiring to enter Bridgeport could consider acquiring that firm. And, if James Staple & Co. is too small, the other option, Lafayette Bank & Trust Co., is so large that First New Haven could not afford the purchase. Lafayette, with $52 million in deposits, represents the only "small" institution in a community of giant banks and thus is in a position to exact a hefty premium far beyond the ability of First New Haven to pay. Nagged by a 14% decline in earnings for the six months ended June 30, 1973, over a comparable period in 1972, First New Haven must concentrate on reducing deficits in the operation of nine of its 22 branches before fantasizing about acquiring a bank the size of Lafayette in Bridgeport.

If appellees are assumed to have the burden of proof on this issue, as appellant would have us believe,[7] appellees have made a strong and credible showing that appellant's suggested options are totally unrealistic. Since little evidence other than speculation was presented by opposing counsel to offset appellee's proof, we submit that the district court's findings on the issue (Findings 185-193, 362 F.Supp. at 265, J.S. 51a-53a) are not clearly erroneous.

(c) Appellant argues that appellees, absent the consolidation, could come into competition with each other at some unspecified time in the future if one were to form a holding company, charter a new bank in the other's service area and then arrange for the holding

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[7] J.S. 27-28 & n. 43. Appellant's contention that it need not prove the availability for sale of any of its recommended "toehold" banks, is without foundation in law. Contrary to appellant's claim, nothing in Mr. Justice Marshall's concurring opinion in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973), relieves appellant from offering proof on this point.

company to acquire the new bank. That such an idea is completely unrealistic is supported by ample evidence of record, on which the district court could properly make definitive findings.

If, as plaintiff insists, more weight should be given to "objective facts" than to subjective testimony, no objective fact speaks louder than that, to date, no bank in Connecticut has formed a holding company for the purpose of chartering a new bank, even though 22 new banks have been established in that state since 1962.[8] The reluctance of Connecticut banks to utilize the holding company route apparently stems from doubts about the legality of chartering a new bank in a closed town to circumvent the state's home office protection statute. Regardless of whether such a move is ultimately found to be legal or not, Connecticut bankers are clearly hesitant to undertake this novel project. As a result, one cannot say that either First New Haven or Connecticut National can, absent the consolidation, consider realistically the organization of a new bank in New Haven or Bridgeport, both of which are closed towns.

Other barriers block any prospect of appellees' resorting to the holding company route to establish a new bank in any town, open or closed. Since February 19, 1965, the Comptroller of the Currency has, with one exception, strictly adhered to its moratorium on new national bank charters in major banking markets in Connecticut, including Bridgeport and New Haven.[9]

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[8] GX-90; Finding 199, 362 F.Supp. at 266, J.S. 55a-56a.

[9] Subsequent to the trial court's decision, the Comptroller gave preliminary approval for a new national bank in the Town of Fairfield contingent upon the sale of $2.5 million in capital stock.

Furthermore, the policy of Connecticut's state banking Commissioner precludes the chartering of a new state bank which is to be sold to a holding company upon formation. Even if no doubt existed about the legality of the holding company vehicle in Connecticut, the policies of state and federal regulatory agencies make this avenue unrealistic.

If regulatory policies do not inhibit the use of the holding company route, cost factors make the idea well-nigh impossible. The formation of a new holding company and the chartering of a new bank would require approximately $2,000,000 in capital funds. Start-up and promotional expenses would bring the figure to $2,500,000 for one office. If several additional offices were established to place the new bank in a truly competitive posture, approximately $750,000 would have to be budgeted as well. Neither bank can afford this kind of money on a venture which has no precedent in Connecticut. Cf. *United States* v. *United Virginia Bankshares, Inc.*, 347 F.Supp. 891, 894 (E.D. Va. 1972).

Assuming, however, that the defendants had ample capital available for the creation of a holding company and the making of acquisitions, there are many other investments which would be more rewarding to the holding company than the chartering of a new bank. Pursuant to the Bank Holding Company Act Amendments of 1970, 12 U.S.C. 1841 *et seq.*, the Federal Reserve Board has approved for investment by bank holding companies approximately ten activities which the Board considers " . . . to be so closely related to banking or managing or controlling banks as to be a proper incident thereto." 12 U.S.C. 1843(c)(8); 12 C.F.R. 225.4 (1973). Significantly, the holding com-

panies of the two large Hartford banks have chosen to invest in the Board's permissible activities rather than to charter a new bank within the state.

These considerations suggest that the district court's findings on the holding company issue (Findings 194-207, 362 F.Supp at 266-268, J.S. 53a-58a) are not clearly erroneous. Appellee's proof represents hard facts which more than stand up against appellant's speculative theories and the sketchy supporting evidence. Therefore, it was not illogical for the trier of fact to conclude that appellant's arguments could not be sustained when the realities of the problem were scrutinized.

(d) A final example, which exhibits more of a complete failure of proof than a conflict in evidence, is especially noteworthy in view of this Court's remarks in *Falstaff, supra.* Although appellant had the opportunity to prove that appellees are potential competitors in the sense that they are so positioned on the edge of the market that they exert beneficial influence on competitive conditions in that market, 410 U.S. at 532-533, no evidence was presented on this point. Rather, it was appellees who undertook to show, as the district court found, that competitors presently in the market do not take seriously the prospect of entry by an outsider through means of the holding company vehicle. (Finding 199, 362 F. Supp. at 266-267, J.S. 55a-56a. In the absence of proof on appellant's part, the court's finding is not clearly erroneous.

These examples of conflicting proofs, drawn from the paramount issue of potential competition, show that the district court properly performed its most basic function of weighing the evidence and coming to

supportable conclusions. Such a task is not within the province of the appellate courts if the district court has acted diligently, independently and responsibly. Appellees make no suggestion to the contrary, nor could they do so in view of the court's extensive findings of fact. Instead, appellant attempts to turn disputed questions of fact into questions of law sufficiently novel to warrant plenary review. Appellant's attempt must fail, however, because (a) this case clearly involves not interpretations of the law but rather a weighing of facts; and (b) the legal questions hypothesized by appellant are no longer novel. As this Court, speaking through Mr. Justice Marshall, recently reminded us in *Tidewater Oil Co.* v. *United States,* 409 U.S. 151, 170 (1972):

> The simple fact is that "[t]he legal issues in most [Government] civil antitrust cases are no longer so novel or unsettled as to make them especially appropriate for initial appellate consideration by this Court, as compared with those in a variety of other areas of federal law," *Brown Shoe Co.* v. *United States,* [370 U.S. 294], at 364 (Harlan, J., dissenting in part and concurring in part).

(2) Recent Actions By This Court As Well As Past Decisions Indicate There Is No Need For Noting Probable Jurisdiction In The Present Case.

This Court has recently noted probable jurisdiction in *United States* v. *Marine Bancorporation, Inc.,* No. 73-38, which, like the instant case, involves the alleged elimination of potential competition in banking. If there are unresolved legal questions surrounding the applicability of potential competition theories to banking, answers can be furnished through the Court's plenary review of *Marine.* The manner in which this Court disposes of *Marine,* combined with the potential

competition guidelines previously enunciated in *Falstaff, supra, Penn-Olin* [10] and *Procter & Gamble,*[11] will be adequate to guide lower courts in future cases. Review of the instant case would not, therefore, give the Court an opportunity to throw additional light upon this now familiar area.

While *Marine* and the instant case are sufficiently similar to make further consideration of this case by the Court unnecessary, there is one glaring difference between the two that reinforces a decision not to grant plenary review. In contrast to *Marine,* where the district court rendered no opinion and subsequently adopted, without change, the defendant's proposed findings of fact and conclusions of law (*Marine,* J.S. at 10), the lower court in the case at bar wrote its own opinion supported by 293 carefully fashioned findings of fact. Clearly, the evidence in this case was diligently evaluated.

(3) The Alleged Anticompetitive Effects Of This Consolidation Are Clearly Outweighed By Its Effect In Meeting The Convenience And Needs Of The Community, Thus Requiring Affirmance Of The Judgment Below.

In bank merger prosecutions under Section 7 of the Clayton Act, the Bank Merger Act of 1966 (12 U.S.C. § 1828(c)(5)) provides an affirmative defense to a merger otherwise prohibited on anticompetitive grounds. Such a merger may be approved by the court where the anticompetitive effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Since the court below found that the consolidation would not violate § 7 of

[10] *United States* v. *Penn-Olin Co.,* 378 U.S. 158 (1964)

[11] *F.T.C.* v. *Procter & Gamble Co.,* 386 U.S. 568 (1967)

the Clayton Act, it need not have weighed the benefits to the convenience and needs, but it did so in order to avoid piecemeal appeals, by assuming *arguendo* that the violations alleged in the complaint were proved. The court's finding that these effects were clearly outweighed, being amply supported by the record, is an independent ground for affirmance of the Judgment below.

This Court has made clear that procompetitive benefits are a proper consideration in determining the convenience and needs of the community under the Bank Merger Act. *United States* v. *Phillipsburg National Bank & Trust Co.*, 399 U.S. 350, 367 (1970). This Court has also stated that where procompetitive gains from better banking service outweigh any anticompetitive detriment and where the merger was essential to secure this net gain to the public interest, the merger should be approved. *United States* v. *Third National Bank in Nashville*, 390 U.S. 171, 188-189 (1968). The district court below, after weighing, found the present consolidation procompetitive and essential to secure this net gain to the public interest.

The most important contribution of this consolidation to the needs and convenience of the community will be the creation of a more competitive banking structure in Connecticut. By combining their resources, appellants will be able to introduce a measure of balance into a competitive picture now dominated by out of state banks [12] and the two one-billion dollar

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[12] A Special Master appointed by the district court found that six large New York City banks alone obtained over $483 million in deposits and $381 million in commercial, industrial and mortgage loans from Connecticut customers. These findings must be considered low because only six New York banks were surveyed, and even the figures from these banks were incomplete. Finding 90, 362 F.Supp. at 253, J.S. 26a-27a.

banks in Hartford.[13] This will be achieved through expansion into other parts of the state, notably Hartford and New London, both of which are now highly concentrated and sorely in need of new entries. Without the consolidation, appellees are destined to remain locally oriented banks, and in the words of a competitor of the consolidated bank, the overpowering position of the two Hartford banks will be assured. (Findings 181, 231-240, 362 F. Supp. at 264, 270-273, J.S. 50a, 64a-67a).

This consolidation will also stimulate competition in New Haven and Fairfield counties, where appellees expect to divest six branches in the towns of Ansonia, Derby, Milford and Orange. The divested branches will be sold to six new entrants, including the two large Hartford banks, neither of whom is now represented in this area. Moreover, the consolidated bank's service area in the two counties will be coincident with the market now served by Union Trust Company, the state's third largest bank, with the inevitable result that competition between the two will be increased. (Findings 217-224, 233, 362 F. Supp. at 269-270, 271 J.S. 61a-62a, 65a)

In rendering his decision[14] approving apellees' application to consolidate, the Comptroller found that the applicants could, by combining their resources,

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[13] The extraordinary market power of the Hartford National Bank and Connecticut Bank & Trust Company is evident in figures indicating that between December 31, 1969 and September 30, 1972, a span of less than two years, the two Hartford banks increased their deposits in an amount greater than the entire deposit structure of the proposed consolidated bank. (Findings 161 and 162, 362 F. Supp. at 261-262, J.S. 45a)

[14] IX-1.

"continue to serve the customers who are outgrowing their individual capabilities, and, with combined resources, to compete more effectively with the larger, statewide Connecticut banks and with the out-of-state banks that canvass the area for profitable banking business." Viewing the State of Connecticut, the Comptroller found it constituted "a lush banking market," attracting large billion and near-billion dollar institutions from New York, Boston and Providence in search of business. To combat the competitive inroads of these out-of-state institutions requires more large banks. Larger banks, he felt, are "essential to Connecticut if the wealth it generates is to remain within the State and redound to the advantage of the people who created it."

The Comptroller also found that "[b]oth banks are able to provide only small proportions of major commercial borrowing requirements, and both suffer from the lack of resources to service the international financing and corporate counselling needs of the large customers." By means of this consolidation, "new and better services will be offered to their customers, thereby making the resulting bank more competitive." In his view, "out-of-state banks, particularly those located in New York and Boston, largely finance the industrial development in Connecticut and drain the banking profits from the state. The only method open to applicants to compete with those banks is to consolidate their resources, raise their lending limits, and provide the sophisticated banking services demanded by industrial and commercial customers."

Appellant disputes the trial court's findings that certain benefits will accrue to the community as a result of this consolidation, arguing that these benefits

"redound almost exclusively to the very large customers" and that "[t]hese services are not important to the great bulk of bank customers." (J.S. 30-31). The evidence does not support these conclusions. At the trial, intervenor called seven witness representing broad sectors of the business community who demonstrated the need for alternative and convenient sources of credit, trust services, computer services and the like. In addition, the Regional Administrator of National Banks testified that the consolidation would benefit all seekers of banking services in the state. In his opinion, the consolidation would make available a broader range of banking services to the entire banking public and the corporate customer. He testified that the public would be provided with an additional and more sophisticated choice in the areas of trust services, international services, computer services, municipal financial services, as well as higher lending limits. (Tr. 1822) Even appellant's chief witness, Dr. Murphy, agreed that bank mergers can assist local customers and that a larger bank may be more apt to loan because the risk factor is less than in a smaller bank. (Tr. 201-202).

The Court determined that a "healthy banking system" in Connecticut should have as its nucleus more than just three statewide banks. As a result of this consolidation, both the people of Connecticut and the state's business community would have a choice among a larger range of banks with similar capacity. (Findings 230 and 232, 362 F. Supp. at 270-271, J.S. 64a-65a)

The Court also found that the consolidated bank's increased lending limit will help both the large and small borrower. Because standard banking practice requires corporate loan customers to keep on deposit

at all times 10% to 20% of their loans in compensating balances, the doubling of the bank's lending limit as a result of the consolidation will cause a similar increase in these balances. These balances can then be plowed back into the community, either in the form of new loans to corporations for plant and equipment, which in turn creates more jobs for local residents, or in the form of personal and installment loans to individuals. The result is that more lendable funds are made available to small borrowers (Finding 259, 362 F.Supp. at 274, J.S. 72a)

Appellant has not challenged the procompetitive or other convenience and needs findings in this case as incredible. Nor could he do so, for they were the result of direct evidences of bankers, businessmen, experts and the Regional Administrator of National Banks. Nor does appellant offer persuasive reasons to review these factual issues here. The Court below, before whom each witness appeared, had no reason to doubt this testimony. The district judge properly weighed the benefits to the convenience and needs of the community against the anticompetitive effects on the assumption that these effects were proved as charged, and correctly concluded that they were clearly outweighed in the public interest "by enabling the new bank to compete statewide with the two big Hartford banks and by offering their customers new services." (J.S. at 12) Clearly, the entire public will benefit from the creation of a banking institution with the capability of throwing its weight against out of state competitors now canvassing the state and the two large, billion dollar banks situated in Hartford.

D. CONCLUSION

The judgment of the court below should be summarily affirmed for the reasons set out above.

Respectfully submitted,

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